

File No. 0000659443

³ In Petition II, Pacific Wireless argues that, in the "unlikely event" that the Commission intended the February 5, 2002 Letter Decision to resolve Petition I, the February 5, 2002 Letter Decision is not a "reasoned response" to that petition. *See* Petition II at 2. *See also*, Letter from Russell Fox, (counsel for Pacific Wireless), to Magalie R. Salas, FCC Secretary, dated December 20, 2001 ("Pacific Wireless December 20, 2001 Letter"). We clarify that the February 5, 2002 Letter Decision was not intended to address Petition I. Rather, we address the arguments raised in Petition I in the instant order. Accordingly, Pacific Wireless' argument in Petition II regarding the February 5, 2002 Letter Decision is moot.

II. BACKGROUND

2. On August 8, 1986, Cortopassi Farms, Inc. assigned station license KGQ445 to Lodi.⁴ Call sign KGQ445 was authorized as a community repeater station on Mount Oso in Stanislaus County, California on frequency 851.8375 MHz.⁵ Diamondback Enterprises, Inc. d/b/a Noack Pump Co. ("Noack") operated a co-channel station under call sign KMA683 for frequency 851.8375 MHz on the same community repeater as Lodi.⁶ On June 25, 1997, Noack assigned station license KMA683 to Delta.⁷ On October 25, 2000, an FCC Form 601 and accompanying assignment of authorization form (FCC Form 1046), designating Felix Difuntorum as signatory for Lodi, was filed with the Commission to assign call sign KGQ445 from Lodi to Pacific Wireless.⁸ The assignment was granted on April 16, 2001.⁹ Felix Difuntorum is Vice President of Delta and is not an officer, director, or authorized employee of Lodi.¹⁰ On July 27, 2001, Pacific Wireless filed an application with the Commission to assign 188 of its SMR licenses to Nextel of California, Inc. ("Nextel"), including call sign KGQ445.¹¹ On September 25, 2001, Lodi sent a letter to the Commission alleging that the prior assignment of station license KGQ445 to Pacific Wireless was unauthorized and requesting that the License be reinstated to Lodi.¹² On November 15, 2001, Pacific Wireless filed: i) an amended application to delete the License from the pending application for assignment to Nextel;¹³ and (ii) a new application to assign the License to Nextel.¹⁴ On December 4, 2000 and January 8, 2001, Felix Difuntorum wrote to the Commission confirming his lack of authority to act on Lodi's behalf, and requested reinstatement of the License to Lodi.¹⁵ The Branch

⁴ See Letter from Jeff Colombini, President of Lodi Farming Inc., to Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, dated September 25 2001 ("Lodi Letter") at 1.

⁵ *Id.*

⁶ See Letter from Felix Difuntorum, Delta Wireless Inc. ("Delta"), to Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, dated December 4, 2001 ("Delta Letter I") at 1; Letter from Felix Difuntorum, Delta Wireless Inc., to Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, dated June 18, 2002 ("Delta Letter II") at 1. Delta maintains that Lodi had abandoned the community repeater station and was no longer a customer at the time of assignment.

⁷ See Delta Letter I at 1; Delta Letter II at 1; Lodi Letter at 1-2.

⁸ See File No. 0000298982, dated October 25, 2000.

⁹ See File No. 0000298982, dated April 16, 2001.

¹⁰ See Delta Letter I at 1; Delta Letter II at 1; Lodi Letter at 1-2.

¹¹ See Pacific Wireless Technologies, Inc. and Nextel Communications, Inc. Seek Consent to Assign 800 MHz Licenses, *Public Notice*, DA 01-1931 (rel. Aug. 14, 2001).

¹² See Lodi Letter at 1-2.

¹³ See File No. 0000523796. On November 16, 2001, the Commission consented to the assignment of Pacific Wireless' remaining SMR licenses to Nextel. See Applications of Pacific Wireless Technologies, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 20341 (WTB 2001).

¹⁴ See File No. 0000659443.

¹⁵ See Delta Letter I at 1; Delta Letter II at 1.

subsequently issued the Letter Decisions, setting aside the prior assignment from Lodi to Pacific Wireless and reinstating the license to Lodi.¹⁶ Based on the Letter Decisions, on February 11, 2002, the Branch also dismissed Pacific Wireless' pending application to assign the License to Nextel.¹⁷ Pacific Wireless subsequently filed the instant Petitions for Reconsideration, Supplement to Petition for Reconsideration and Request for Stay.

III. DISCUSSION

3. We affirm the Branch's decision to reinstate station license KGQ445 to Lodi and set aside the assignment of the License from Lodi to Pacific Wireless. It is well established that an unauthorized assignment is void *ab initio*, and cannot convey any rights to the assignee.¹⁸ We find that the assignment from Lodi to Pacific Wireless was unauthorized, because Felix Difuntorum had no authority to act as Lodi's signatory on the assignment of authorization form filed on October 25, 2000. Pacific Wireless fails to offer any evidence or even allege that Mr. Difuntorum had authority to act as signatory for Lodi. In fact, in his letters to the Commission, Mr. Difuntorum requests that the License be reinstated to Lodi, because he lacked authority to assign the License.¹⁹ We therefore reject Pacific Wireless' argument that the Branch revoked the License before considering all the facts and circumstances as required by Commission precedent.²⁰

4. We further reject Pacific Wireless' argument that the Branch failed to provide proper notice pursuant to section 312(c) of the Communications Act before reinstating the License to Lodi.²¹ As the Commission stated in *Tsooris*, if an assignment is "void *ab initio*," the purported assignee is not a Commission recognized licensee, and therefore the provisions of section 312(c) of the Communications Act do not apply.²² We find the cases cited by Pacific Wireless as authority for its section 312(c) argument inapposite, because those cases involve proceedings against Commission recognized licensees that acquired their licenses through authorized Commission processes, not through an unauthorized assignment.²³ For example, in *S.A. Dawson Associates*, the case upon which Pacific Wireless chiefly

¹⁶ See December 20, 2001 Letter Decision at 1-2; February 5, 2002 Letter Decision at 1.

¹⁷ See File No. 0000659443.

¹⁸ See *In Re Application of Tsooris Corporation and Talkline Broadcasting Corporation*, *Memorandum Opinion and Order*, 12 FCC Rcd 1675, 1679, ¶ 10 (1997) ("*Tsooris*"). See also *In the Matter of Clarklift of San Jose, Inc. and Moore Material Handling Group*, *Second Order on Further Reconsideration*, 16 FCC Rcd 14844 (WTB 2001) ("*Clarklift*").

¹⁹ See Delta Letter I at 1; Delta Letter II at 1. Mr. Difuntorum alleges that his attempt to assign the license was inadvertent and based on a mistaken belief that Delta had acquired the license in 1997. See *id.*

²⁰ See Petition I at 3-4; Petition II at 3-4.

²¹ See *id.*

²² See *Tsooris*, 12 FCC Rcd at 1679, ¶ 10.

²³ See *In re Applications of Dale J. Parsons, Jr.*, *Memorandum Opinion and Order*, 10 FCC Rcd 2718, ¶ 16 (1995) (noting procedural requirements of Section 312 apply only to Commission licensees); MCI Telecommunications Corporation, *Order and Notice of Apparent Liability*, 3 FCC Rcd 509, 513-514, ¶¶ 46-47 (1988) (recognized Commission licensee entitled to procedural safeguards); Mark Sobel, Application for Certain (continued....)

relies, the request for reinstatement of a license centered on the issue of the corporate authority of an admitted employee of the license holder to assign the license.²⁴ Under such circumstances, the Commission will investigate to determine whether a substantial and material question of fact exists that requires the matter under consideration be designated for hearing or referred to courts of competent jurisdiction.²⁵ There is no substantial and material question of fact in the instant case, because it is uncontroverted that Felix Difuntorum possesses no connection to the licensee, Lodi, and has admitted his lack of authority to assign the license.

5. We also reject Pacific Wireless' argument that the Branch did not have the authority to set aside the assignment to Pacific Wireless because the assignment was administratively final. Pacific Wireless argues that it is in the public interest to have Commission decisions remain final if not timely challenged.²⁶ Nonetheless, it is well settled that misuse of Commission processes can result in the re-opening of a proceeding.²⁷ Pacific Wireless' reliance on *Birach Broadcasting* in support of its administrative finality argument is misplaced because, in that case, the Commission found that its determination to reissue a broadcast license would not be re-opened unless there had been fraud in the proceeding or the challenged result was unconscionable.²⁸ Here, while the record does not support a finding of fraud in the assignment process, the filing of an unauthorized assignment through mistake represents a misuse of the Commission's processes, and it would be unconscionable to apply the doctrine of administrative finality to an assignment that was void *ab initio*.²⁹

6. In addition, we are not persuaded by Pacific Wireless' argument that the Branch should not have set aside the assignment, because Pacific Wireless had no knowledge of the unauthorized assignment. Lack of knowledge has no bearing on whether the assignment should be invalidated.³⁰ Although Pacific Wireless states that it had no prior knowledge of the unauthorized assignment, failure to return the parties to their rightful positions under these circumstances would encourage such conduct, have an injurious effect on the Commission's processes, and otherwise be contrary to the public interest.

7. Further, we reject Pacific Wireless' argument that because this matter involves a private
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Part 90 Authorizations, *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 12 FCC Rcd 3298 (1997) (Commission licensee ordered to show cause why his licenses should not be revoked).

²⁴ See S.A. Dawson Associates, *Memorandum Opinion and Order*, 17 FCC Rcd 472, 474, ¶¶ 6-7, (WTB 2002) ("S.A. Dawson Associates").

²⁵ *Id.*

²⁶ Pacific Wireless claims that the Lodi Letter objecting to the unauthorized assignment was submitted "well after the time for challenging the FCC's action has past." Petition I at 6.

²⁷ See *In Re Application of Birach Broadcasting Corporation*, *Memorandum Opinion and Order*, 16 FCC Rcd 5015, 5018, ¶ 8 ("*Birach Broadcasting*").

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Petition I at 6; Petition II at 3.

contractual dispute, the Courts and not the Commission should decide it.³¹ The Commission generally does not adjudicate private contractual disputes, but instead attempts to reach a fair accommodation between its exclusive authority over licensing matters and the authority of State and local courts to decide contractual matters under State and local law.³² However, where there is no legal or factual question that an unauthorized assignment has taken place, the Commission will act to invalidate the transaction.³³ Accordingly, Pacific Wireless' reliance on *Listener's Guild*, where material factual questions requiring local court resolution did exist, is misplaced.³⁴

8. Pacific Wireless additionally seeks reconsideration of the Branch's decision rejecting its request that the License be cancelled due to Lodi's failure to operate the station for one year or more.³⁵ We affirm the Branch's finding that Pacific Wireless failed to provide adequate information demonstrating that the License canceled automatically due to Lodi's failure to operate the station for one year or more.³⁶ Section 90.157 of the Commission's rules provides that a station license terminates automatically if operations are permanently discontinued.³⁷ The rule section further defines "permanently discontinued" as any station that has not operated for one year or more.³⁸ As evidence of non-operation, Pacific Wireless offers the declaration of its Chief Executive Officer, Jeffery Fuller, which states that, after monitoring the channel, Pacific Wireless detected no activity from April 16, 2001 to December 20, 2001, the period in which Pacific Wireless controlled the license.³⁹ Pacific Wireless also cites statements made by Felix Difuntorum of Delta, which state that Lodi abandoned its community repeater station and was no longer a customer when the co-channel station, call sign KMA683, was assigned to Delta in 1997.⁴⁰ The Division found that because Pacific Wireless monitored the station for less than one year, its

³¹ See Petition I at 6; Petition II at 3.

³² See, e.g., In the Matter of Airtouch Paging, Inc. For Consent to Partial Assignment of Station KCC485 to Schuylkill Mobile Fone Inc., *Order*, 14 FCC Rcd 9658, (CWD/WTB 1999); *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) ("*Listener's Guild*"). See also *Clarklift*, 16 FCC Rcd at 14846, ¶¶ 6-7.

³³ See *Clarklift*, 16 FCC Rcd at 14846, ¶¶ 6-7; In the Matter of Champion Communications Services, Inc., *Order*, 15 FCC Rcd 12832, ¶ 2 (PSPWD/WTB 2000).

³⁴ *Listener's Guild*, 813 F.2d at 468-69 (Commission has discretion to determine whether a substantial and material question of fact is presented requiring resolution by courts of competent jurisdiction).

³⁵ See Petition I at 6; Petition II at 4; Letter from Russell Fox (counsel for Pacific Wireless), to Magalie R. Salas, Secretary FCC, dated May 6, 2002 ("Pacific Wireless May 6, 2002, Letter") at 1.

³⁶ See December 20, 2001 Letter Decision at 1-2; February 5, 2002, Letter Decision at 1-2.

³⁷ See 47 C.F.R. § 90.157.

³⁸ *Id.*

³⁹ See Pacific Wireless December 20, 2001 Letter at 1.

⁴⁰ See Pacific Wireless May 6, 2002 Letter at 1; Delta Letter I at 1; Delta Letter II at 1. Pacific Wireless does not raise this argument in its Petitions, but rather does so in a subsequently filed letter dated May 6, 2002. See Pacific Wireless May 6, 2002 Letter. There is no evidence in the record that Pacific Wireless was placed on notice of the Delta Letters prior to filing the Petitions; nonetheless, we will exercise our discretion and consider this argument notwithstanding the procedural defect.

certification of non-operation failed to provide a level of proof necessary for cancellation.⁴¹ As the Letter Decisions state, Pacific Wireless' monitoring of the frequency for less than one year does not serve to substantiate a violation of section 90.157.⁴² Similarly, the statements of Felix Difuntorum, standing alone, do not conclusively establish Lodi's permanent discontinuance of its operation of the License. Specifically, Pacific Wireless seeks to rely on Mr. Difuntorum's statements that during the period of Delta's ownership of the community repeater, Lodi was not a customer.⁴³ However, there remain significant questions in the record regarding the ownership of the facilities stationed on Mount Oso in Stanislaus County, California,⁴⁴ because Pacific Wireless and Delta maintain that Noack owned the repeater, and Lodi maintains it owned the repeater.⁴⁵ As such, the statements of Felix Difuntorum, without more, do not conclusively demonstrate Lodi's non-operational status for one year or more in violation of the Commission's rules. Moreover, Mr. Difuntorum's statements, being unsworn and uncertified, do not satisfy the requirements of section 1.106(d) that findings of fact in petitions for reconsideration be stated with particularity.⁴⁶

9. Finally, we reject Pacific Wireless' argument that Lodi's license cancelled automatically because it failed to construct and begin operations within one year after the date of the license grant pursuant to section 90.155.⁴⁷ We make this finding because Pacific Wireless has not provided any evidence that Lodi failed to construct its facilities or failed to begin operations within the required one year time period under the rule.

⁴¹ See February 5, 2002 Letter Decision at 1-2.

⁴² *Id.*

⁴³ See Delta Letter I at 1; Delta Letter II at 1.

⁴⁴ See *id.*; Lodi Letter at 1-2.

⁴⁵ *Id.*

⁴⁶ See *In re Application of Communico Oceanic Corporation (Assignor) and KHVH Inc. (Assignee) for Assignment of License Permit for KPOI Honolulu, Hawaii, Memorandum Opinion and Order*, 68 FCC 2d 638 (1978) (unsworn statements in reconsideration proceeding before the Commission are not pled with "particularity" and are accorded less weight than sworn affidavits); 47 C.F.R. § 1.106(d).

⁴⁷ 47 C.F.R. § 90.155. Pacific Wireless' reliance on *Dale Kane* as authority for this argument is misplaced because, in that matter, the Commission determined that the license automatically cancelled based on unrefuted evidence of the licensee's failure to construct and operate its facilities pursuant to the Commission's rules. See *In re Dale Kane, Order*, 14 FCC Rcd 14052, 14057, ¶ 14 (PSPWD/WTB 1999) ("*Dale Kane*").

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), 303(r), and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Petitions for Reconsideration filed by Pacific Wireless Technologies, Inc. on January 17, 2002 and March 7, 2002, the Supplement to Petition for Reconsideration filed on March 7, 2002, and the Request for Stay filed on January 17, 2002 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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